Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

BILLYE E. BOSTIC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a criminal defendant is entitled to a separate trial to secure the exculpatory testimony of a co-defendant.

2. Whether a prosecutor's attempts to prevent exculpatory testimony by a co-defendant through improper plea inducements and threats of perjury prosecution violate a defendant's Fifth and Sixth Amendment rights.

3. Whether there was sufficient evidence to convict Petitioner of conspiracy or aiding and abetting false entries and false statements.

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals for the Fifth Circuit:

1. **BILLYE E. BOSTIC**, Defendant/Appellant/Petitioner;

2. **ROBERT M. PAYNE**, Co-Defendant-Appellant;

3. **RAYMOND D. CHAVEZ**, Co-Defendant-Appellant; and

4. **THE UNITED STATES OF AMERICA**, Appellee.

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The opinion delivered by the Court of Appeals in this case was not published.[1] A copy of the opinion is attached beginning at page 1 of the Appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on November 23, 1994. App. at 1-13. Petitioner Bostic's Petition for Rehearing was denied on January 18, 1995. App. at 14. This petition is filed within 90 days of the denial of rehearing. *See* Sup. Ct. R. 13.1, 13.4. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portions of constitutional and statutory provisions involved in this case are as follows:

1. *Fifth Amendment to the United States Constitution*:

> No person shall be . . . compelled in any criminal case to be a witness against himself,

[1] Although the per curiam opinion by the Fifth Circuit panel was not published, Fifth Circuit Local Rule 47.5.3 provides that "[u]npublished opinions are precedent."

nor be deprived of life, liberty, or property without due process of law.

2. *Sixth Amendment to the United States Constitution*:

In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.

3. *18 U.S.C. § 1512*

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to –

(1) influence, delay or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to –

(A) withhold testimony . . . from an official proceeding;

. . .

shall be fined under this title or imprisoned for not more than ten years, or both.

(c) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from –

(1) attending or testifying in an official proceeding;

. . .

or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

4. *18 U.S.C. § 2*:

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

5. *18 U.S.C. § 371*:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $250,000 or imprisoned not more than five years, or both.

6. *18 U.S.C. § 1001 (1985)*:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $250,000 or imprisoned not more than five years, or both.

7. *18 U.S.C. § 1006 (1985)*:

> Whoever, being an officer, agent or employee of or connected in any capacity with . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation . . . with the intent to defraud any such institution or any other company, . . . or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, . . . shall be fined not more than $250,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner Billye E. Bostic was the former chief financial officer of the El Paso Electric Company (hereafter "Electric Company") and an advisory director of the El Paso Federal Savings and Loan (hereafter "El Paso Federal"). Petitioner was indicted in two counts of an eight count indictment for conspiring to make false entries and false statements, in violation of 18 U.S.C. §§ 371, 1001 and 1006; and for aiding and abetting the making of a false entry in violation of 18 U.S.C. §§ 2 and 1006. App. at 20-37. Also indicted with Petitioner were the former president of El Paso Federal, Robert Payne, who was charged in all eight counts, including the six substantive counts; and the president of Sun Country Savings Bank (hereafter "Sun Country"), Raymond D. Chavez, who was indicted

only on the conspiracy count. The transaction underlying the indictment was a collateralized participation sale of negotiable instruments in June of 1985 from El Paso Federal to the Electric Company.

Prior to trial, Petitioner filed a motion requesting a severance from co-defendant Payne pursuant to Federal Rule of Criminal Procedure 14. App. at 38-45. The primary basis for the motion was Petitioner's need to secure the exculpatory testimony of Payne. The motion was supported by an affidavit from Payne, in which he described the substance and nature of his testimony. Payne further stated that he would not testify at a joint trial where his guilt or innocence was to be determined, but that he would testify at a separate trial if he had received immunity or was no longer a defendant. App. at 43-45. Co-defendant Chavez filed a similar motion for severance, which was likewise supported by an affidavit from co-defendant Payne.

Immediately after Petitioner and co-defendant Chavez filed their motions, the Assistant United States Attorney proposed a plea agreement to co-defendant Payne, in which he would be allowed to plead guilty to one of the eight counts in exchange for his promise *not* to testify on behalf of Petitioner and Chavez. Petitioner and co-defendant Chavez moved for dismissal of the indictment because of the prosecutor's misconduct. During the in camera hearing on this motion prior to trial, the prosecutor acknowledged the improper plea offer. App. 48-49, 53-54.

Moreover, the prosecutor disclosed that from the early stages of the case, she had repeatedly been

informed of the exculpatory nature of Payne's testimony, but that she chose not to believe Payne. App. 48-49, 53-54. She acknowledged that she repeatedly told Payne, through his attorney, that she believed Payne would perjure himself if he testified, App. 49, and that she had overtly threatened to prosecute Payne for perjury if he testified. App. 54.

Prior to trial, the District Court denied Petitioner's motions requesting severance and dismissal. App. 57-58. Petitioner re-urged his motion for severance during and after trial, and the District Court again denied the motion. App. 59-60.

The Court of Appeals affirmed the District Court's denial of Petitioner's severance motion, holding that "the same quantum of evidence" would have been marshalled "whether the defendants were charged separately or together." App. 9. In affirming the District Court's denial of Petitioner's motion to dismiss, the Court of Appeals acknowledged that the plea offer was improper, but noted that the offer was not accepted; and excused the perjury threats reasoning that the prosecutor was entitled to take good faith steps to avert perjury. App. 11.

At the conclusion of trial, Petitioner was convicted on both counts with which he was charged. In reciting the evidence on which it relied in finding sufficient evidence to affirm Petitioner's conviction, the Court of Appeals seriously misstates or misapprehends the facts.

The transaction underlying the indictment was a collateralized participation sale of negotiable instruments totaling approximately $5.5 million from El Paso Federal to the Electric Company, with a subsequent sale from the

Electric Company to Sun Country. El Paso Federal retained a contingent obligation to repurchase the notes from the Electric Company in the event Sun Country did not perform its obligation to purchase the notes. El Paso Federal also pledged additional mortgage notes as collateral. App. 4. This transaction itself was legal. Moreover, the District Court expressly found that the transaction did not cause any loss or harm to the institution. App. 61-62.

According to the Government, the crime occurred in the manner in which the transaction was recorded in the books and records of El Paso Federal, and the failure of the defendants to disclose the recourse nature of the transaction to the El Paso Federal board of directors and the regulators. App. 20-37. Petitioner's alleged participation in this conspiracy was limited to two events: (1) a meeting in May 1985 of the El Paso Federal Board of Directors at which the transaction was approved, and (2) the subsequent drafting and modification of the transaction documents.

As to the May 1985 board meeting, the Court of Appeals opinion incorrectly states that Petitioner "did not indicate whether the proposed sale would be with or without recourse." App. 3. The only evidence of Petitioner's participation at this meeting consisted of the testimony of two directors, who testified that while the minutes indicated that Petitioner attended the meeting, they did not recall him participating in the discussion of the transaction at the end of the meeting. Further, one of the directors testified that Petitioner had a practice of

recusing himself and leaving the board meeting when transactions with the Electric Company were discussed.[2]

As to the drafting of the transaction documents, the essential theory of the Government's case was that there were two separate documents for the transaction, a Loan Participation Agreement and a Collateral Assignment and Security Agreement, but that only the Collateral Assignment disclosed the recourse nature of the transaction, thus creating a "secret" agreement. In its opinion, the Court of Appeals stated that the Loan Participation "in its final form represented that the transaction was an outright sale without recourse." App. 4. The evidence in the record is entirely contrary to the Government's theory and the court's assertion. The attorney who drafted the documents as well as the supervisory agent for the institution both testified unequivocally that the Loan Participation reflected a sale "with recourse," consistent with the Collateral Assignment. There was *no* evidence that the Loan Participation was "without recourse."

As to Petitioner's role in the preparation of these documents, the record shows that his involvement was minimal. Although not discussed in the opinion below, Petitioner initially relayed the basic terms of the transaction to the Electric Company's attorneys so that they could prepare the documents. Thereafter, the attorneys, exercising their sole judgment without any direction from the defendants or any other persons, decided to use

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[2] Indeed, at oral argument before the Fifth Circuit, the Assistant United States Attorney admitted in response to the court's question that there was no evidence that Petitioner participated in the board's consideration of the transaction.

separate documents for the transaction. During the drafting process, an employee of the Electric Company, Gary Hedrick, contacted the attorneys and instructed them to modify the documents by moving the detailed terms of El Paso Federal's contingent recourse obligation from the Loan Participation to the Collateral Assignment. The Court of Appeals correctly recites that Mr. Hedrick could not recall who ordered him to direct the attorney to modify the documents, but that one of three persons, including Petitioner, would have had such authority. App. 4. There is no further evidence of Petitioner's involvement in preparing these documents.

The Court of Appeals also discusses other provisions of these documents, specifically the "integration clause" and the lack of cross referencing in the Loan Participation. App. 4. The opinion fails to mention that the attorney who drafted the documents testified that she alone crafted these provisions, without any instructions from Petitioner or any one else. As a further example of the Court of Appeals' misapprehension of the facts, the opinion quotes only a portion of the "boilerplate" integration clause in the Loan Participation, implying that the Collateral Assignment was thereby concealed, App. 4, omitting the rest of the sentence which states "and cannot be modified in any respect except by an agreement in writing." The Collateral Assignment was obviously an "agreement in writing."

Finally, as to the preparation and handling of the documents, the Court of Appeals notes that the Collateral Assignment, which the Government contended was a "secret agreement," was filed in the County courthouse, but the Loan Participation was not. App. 5. Again, the

attorney who drafted the agreements testified that she alone was responsible for filing the documents in the county deed records, without any participation by the defendants, for the purpose of "giving notice to the world," not for the purpose of keeping any of the agreement secret. Since the Collateral Assignment was the only document affecting any interests in real property, it was the only document that needed to be filed in the county records.

As further proof of the alleged conspiracy, the opinion below states that "[t]he transaction also went unrecorded at [the Electric Company]." App. 5. This statement is *completely* contrary to the evidence adduced at trial. Two Electric Company representatives testified at length about the company's documentation of the transaction, and copies of records showing the Electric Company's accounting of the transaction were admitted into evidence as Bostic Exhibits 14 and 17.

Based on these and other misapprehended facts, the Court of Appeals affirmed Petitioner's conviction for conspiracy and aiding and abetting. A review of the six substantive counts with which co-defendant Payne was charged further illustrates the error of the court's decision.

1. Count Three charged that the general ledger of El Paso Federal was a false entry because it did not disclose the recourse nature of the transaction. The opinion below acknowledged that the El Paso Federal employee who made the entry knew that the transaction was collaterized and with recourse, but that he recorded it as an outright sale. App. 5. This employee also testified that he made

the entry without any instructions from any of the defendants, and that the recourse and collateral nature of the transaction was not something that would be noted in the general ledger history. There was no evidence that any of the defendants were even aware of the entry. Nonetheless the Court of Appeals relied on this fact in affirming the defendants' convictions.

2. Count Four of the indictment charged that a false entry was made in El Paso Federal's June 30, 1985 Quarterly Statement because it failed to report a "contingency to repurchase loans" on line 400 of Section F. App. 32-33. *This document was never admitted into evidence.* Although she did not prepare or assist in the preparation of the document, the Government called El Paso Federal's comptroller to testify about the document. Contrary to the indictment and the Government's contention, this witness testified that the transaction actually should have been recorded in Section B, not F; and that the information contained in Section B was sufficiently large to include the transaction. Therefore the failure to include the transaction in Section F could not have been a false entry. Further, there is no evidence that Petitioner, as an advisory director, had any knowledge of the document or the information used or not used in its preparation.

3. Counts Five and Six charged Payne with making nearly identical false entries in a Management Questionnaire. App. 33-35. Inexplicably, the Court of Appeals reversed Payne's conviction on Count Five but not on Count Six. App. 10-11.

4. The District Court granted a judgment of acquittal for Payne on Count Seven.

5. The evidence relating to Count Eight against Payne was admitted with a limiting instruction that it not be considered against Petitioner or Chavez.

ARGUMENT

The crux of this appeal, as presented by the first two questions, is a defendant's right to present the testimony of a co-defendant witness in his defense, a right secured by the Fifth and Sixth Amendments to the United States Constitution.[3] In affirming Petitioner's conviction, the Court of Appeals for the Fifth Circuit has sanctioned the abridgment of this fundamental constitutional right in an opinion that conflicts with this Court's prior opinions as well as the opinions of other circuits. In *Washington v. Texas*, 388 U.S. 14 (1967), this Court held that a Texas statute that prohibited a co-defendant's testimony violated a defendant's due process and Sixth Amendment rights. Previously, in *Rosen v. United States*, 245 U.S. 467, 471 (1918), this Court rejected the old common law rule of

[3] Petitioner has also presented a question on the sufficiency of the evidence to support Petitioner's conviction. Petitioner recognizes that this Court reviews only cases where there are important or special issues, and that the Court rarely grants a petition to correct an error affecting only the petitioner. However, in reviewing severance and prosecutorial misconduct issues, the lower courts often review the strength of the evidence against the defendant. Since this Court might also consider this factor, Petitioner has endeavored to discuss the evidence, and while doing so has presented the question on sufficiency to preserve error in the event the Court is willing to grant review on this issue.

evidence that prohibited a co-defendant's testimony, a ruling the Court stated in *Washington v. Texas* was required by the Sixth Amendment. *Washington v. Texas*, 388 U.S. at 22. In essence, the Court of Appeals' opinion in this case holds that a procedural rule and the unilateral acts of an Assistant United States Attorney can succeed where this Court has held that evidentiary rules and the acts of a State Legislature cannot.

Until the Court of Appeals' decision in this case, the test in the circuits for determining when a severance should be granted under Rule 14 of the Federal Rules of Criminal Procedure for the purpose of securing exculpatory testimony of a co-defendant who refused to testify at a joint trial was relatively uniform.[4] The circuit courts

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[4] There does exist one area of conflict among the circuits that is not directly presented to this Court in reviewing the Court of Appeals' decision, but which was raised by the Government in objecting to Petitioner's Motion for Severance at the District Court level and in its brief on appeal to the Fifth Circuit. The conflict arises out of the requirement that the defendant must establish that the co-defendant would in fact testify at the defendant's separate trial. Some circuits have held that the offer to testify must be unconditional, and may not be conditioned on the order of trials. *See, e.g., United States v. Washington*, 969 F.2d 1073, 1080 (D.C.Cir. 1992), cert. denied, 113 S.Ct. 1287 (1993); *United States v. Blanco*, 844 F.2d 344, 352-53 (6th Cir.), cert. denied, 486 U.S. 1046 (1988); *United States v. Haro-Espinosa*, 619 F.2d 789, 793 (9th Cir, 1979); *United States v. Becker*, 585 F.2d 703, 706 (4th Cir. 1978), cert. denied, 439 U.S. 1080 (1979); The Government relied on this line of cases in objecting to Petitioner's Motion for Severance, and in its argument at the Court of Appeals. *See* Corrected Brief of the United States of America at 32-35; *see also United States v. Smith*, 46 F.3d 1223, 1231, n.3 (1st Cir. 1995) (identifying the "open question" and citing cases). Although this issue was not addressed by the Court of Appeals

generally applied the same two part test to determine whether a severance should be granted. First, the movant is required to demonstrate: (1) a bona fide need for the co-defendant's testimony; (2) the substance of the testimony; (3) the exculpatory nature and effect of the testimony; and (4) that the co-defendant would testify if the cases were severed. If the moving defendant satisfies these requirements, then the court is required to consider and weigh (1) the significance of the testimony in relation to the movant's theory of defense; (2) the extent of prejudice caused by the unavailability of the testimony; (3) the counter arguments of judicial administration and economy; and (4) the timeliness of the motion. *See e.g., United States v. Drougas*, 748 F.2d 8, 19 (1st Cir. 1984); *United States v. Finklestein*, 526 F.2d 517, 523-24 (2d Cir. 1975) cert. denied 425 U.S. 960; *United States v. Rosa*, 560 F.2d 149, 154-56 (3d Cir.), cert. denied, 434 U.S. 911 (1977); *United States v. Rusher*, 966 F.2d 868, 877-78 (4th Cir.), cert. denied, 113 S.Ct. 351 (1992); *see generally* 1 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 225, at 832-35 (1982) (citing illustrative cases in footnotes 5 and 6). Before the Court of Appeals' opinion in this case, the Fifth Circuit applied the same test. *See, e.g., United States v. Rocha*, 916 F.2d 219, 232 (5th Cir. 1990), cert. denied, 111 S.Ct. 2057 (1991); *United States v. Ramirez*, 954 F.2d 1035, 1036-37 (5th Cir.), cert. denied, 112 S.Ct. 3010 (1992).

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in this case, and is therefore not directly presented in this appeal, it is an issue that the Court may wish to resolve should it grant certiorari in this case. If the Court should decide to resolve this area of conflict, Petitioner requests an opportunity to brief this issue.

The opinion below conflicts with these holdings in reasoning that "[w]hile Payne had been charged with substantially more criminal counts than had Bostic and Chavez, all three defendants were charged with conspiracy. Thus, whether the defendants were charged separately or together, the government would have marshalled the same quantum of evidence in prosecuting the conspiracy count." The opinion also ignores the exculpatory affidavit filed by Petitioner with his motion, and does not consider the substance of the affidavit offered by Petitioner. App. 8. Finally, the opinion failed to consider the summary denial by the District Court of Petitioner's motion. App. 57-58. *See United States v. Smith*, 46 F.3d 1223, 1232 (1st Cir. 1995) (in which the First Circuit Court expressly considered the District Court's close scrutiny and careful analysis in determining that the trial court had not abused its discretion in denying a severance motion). The Court of Appeals holding in this case resembles a ruling on joinder, but clearly conflicts with all other circuit cases on severance and establishes a new precedent that may be relied on in future severance cases, at least in the Fifth Circuit.[5]

The opinion below also conflicts with this Court's opinion in *Zafiro v. United States*, 113 S.Ct 933 (1993). In reviewing the denial of a severance motion predicated on mutually antagonistic defenses, this Court held that "a

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[5] Petitioner is aware of at least one case currently on appeal to the Fifth Circuit from the El Paso Division of the Western District of Texas that involves an identical severance issue, in a case tried by the same Assistant United States Attorney. *United States v. Billy Mack Jobe, et al.*, Cause No. 94-50646.

district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 938. In describing the circumstances in which such a risk might occur, this Court stated "a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." *Id.* In support of this statement, this Court cited *Tifford v. Wainwright*, 588 F.2d 954 (5th Cir. 1979) (per curiam), in which the Fifth Circuit confronted precisely the issue raised by this case: the need to secure the exculpatory testimony of a co-defendant.

The decisions of the District Court and the Court of Appeals in this case compromised the specific constitutional right of a defendant to present the testimony of a co-defendant, recognized in *Washington v. Texas*, 388 U.S. 14 (1967). By precluding the use of a co-defendant's exculpatory testimony, the decisions below also prevented the jury from making a reliable decision on Petitioner's guilt or innocence. *See, e.g., Benson v. United States*, 146 U.S. 325 (1892); *Washington v. Texas*, 388 U.S. at 22.

The opinion of the Court of Appeals does not explain what standard it applied in rejecting Petitioner's argument that his due process rights were violated by the prosecutor's plea offer and perjury threats. Although the lower court recognized that the plea offer was improper, citing *United States v. Hendricksen*, 564 F.2d 197, 198 (5th Cir. 1977), it excused the misconduct because Payne never accepted the plea offer. App. 11. While the Court of

Appeals assumed that "the government's thinly veiled warning of possible prosecution was the critical factor in Payne's decision not to testify" it found that there was no due process violation because the "prosecutor's hands are not tied so tightly as to prevent good faith efforts to avert perjury." App. 11-12. These holdings conflict with principles established in prior decisions of this Court and other circuits.

While the Government might argue the prosecutor's misconduct had no effect because Payne had a Fifth Amendment right to refuse to testify at a joint trial, Payne also might have waived this personal right. This Court stated in *Webb v. Texas*, 409 U.S. 95 (1972), that comparable intimidation by a judge "could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." *Id.* at 98.

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that the good faith or bad faith of a prosecutor in suppressing exculpatory evidence is irrelevant when a constitutional right is at issue. *Id.* at 87. In cases more directly on point, circuit courts have likewise held that the good faith of a prosecutor is irrelevant in determining whether a defendant's constitutional rights have been violated by the prosecutor's threats of prosecution to a witness. *See, e.g., United States v. Hammond*, 598 F.2d 1008, 1012 (5th Cir. 1979); *United States v. Morrison*, 535 F.2d 223, 227 (3d Cir. 1976) (noting that "[t]he good faith of the Assistant United States Attorney would be relevant if *he* were charged with violation of" 18 U.S.C. § 1503 (the predecessor to 18 U.S.C. § 1512), and that similar conduct by a defense attorney would lead "to the grand jury");

United States v. Thomas, 488 F.2d 334, 336 (6th Cir. 1973) (per curiam) (stating that a prosecutor's threats, delivered by a secret service agent, served no "valid purpose even accepting the assertions of good faith").

These cases stand for the proposition that a defendant's due process right to present witnesses, as established in *Washington v. Texas*, can be violated by governmental interference. *Heller v. Plave*, 743 F.Supp. 1553, 1564 (S.D.Fla. 1990); *see also United States v. Heller*, 830 F.2d 150, 152 (11th Cir. 1987) (discussing cases). The Court of Appeals' holding in this case that a prosecutor's "good faith" efforts to avert perjury excuses a violation of fundamental constitutional rights directly conflicts with decisions of this Court and other circuits.

CONCLUSION

This Court has long recognized the importance of protecting the integrity of the judicial, truth-seeking process, and the fundamental role of the Fifth and Sixth Amendments in protecting that process and ensuring a fair trial. *See, e.g., Satterwhite v. Texas*, 486 U.S. 249, 256 (1988); *Taylor v. Illinois*, 484 U.S. 400, 409-10 (1988); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Washington v. Texas*, 388 U.S. at 20; *United States v. Reid*, 53 U.S. 383, 388-89 (12 How. 360, 364-5) (1852); *see also* 18 U.S.C. § 1512, Congressional Findings and Declaration of Purposes, § 2 Pub.L. 97-291. As this Court stated in *Satterwhite*, "some constitutional violations, however, by their very nature cast so much doubt on the fairness of the trial

process that, as a matter of law, they can never be considered harmless. Sixth Amendment violations that pervade the entire proceeding fall within this category." *Satterwhite* 486 U.S. at 256.

The denial of the motion for severance and the acts of the prosecuting attorney violated Petitioner's Fifth and Sixth Amendment rights, and pervaded the entire proceeding. As a result, in this case where the evidence of Petitioner's guilt was marginal, the "partial presentation of facts" undermines the efficacy of the criminal justice system. *United States v. Nixon*, 418 U.S. 683, 709 (1974).

In denying Petitioner his constitutional right to present exculpatory testimony, the Court of Appeals rendered a decision that conflicts with prior decisions of this Court and other circuits, thereby creating a precedent that may affect future defendants, and excuse future misconduct by prosecutors.

Petitioner respectfully requests that this Court grant review of this case to protect the integrity of the criminal justice system, to resolve the conflicts created by the Court of Appeals' decision, and to prevent the denial of future defendants' constitutional rights. Upon review of this case, Petitioner prays that this Court reverse the decision of the Fifth Circuit and grant Petitioner a new

trial, or render a judgment of acquittal for insufficient evidence.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8540

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAYMOND D. CHAVEZ, ROBERT M. PAYNE and BILLYE E. BOSTIC,

Defendants-Appellants.

Appeals from the United States District Court
For the Western District of Texas

(EP-92-CR-447-1,2,3 (B))

(Filed Nov. 23, 1994)

Before REAVLEY, DAVIS and DEMOSS, Circuit Judges.

PER CURIAM:*

The defendants, Raymond D. Chavez, Robert M. Payne and Billye E. Bostic, were convicted of conspiring to cause false entries to be made in the records of a financial institution *and* conspiring to make false statements to a federal officer. 18 U.S.C. § 371; 18 U.S.C.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

§ 1006; 18 U.S.C. § 1001. Payne and Bostic also were convicted of the substantive offense of causing false entries to be made in the records of a financial institution. 18 U.S.C. § 1006; 18 U.S.C. § 2. In addition, only Payne was convicted of the substantive offense of making false statements to a federal officer. 18 U.S.C. § 1001. The defendants now appeal the sufficiency of the evidence supporting their convictions, in addition to various other rulings by the district court.

I.

This case stems from the repurchase of delinquent construction loans from a federally insured bank to an electric company. We will separate our discussion of the facts from our discussion of procedural history.

A.

In January 1985, the Federal Home Loan Bank Board (FHLBB) began examining the El Paso Federal Savings & Loan Association (EPF) and ultimately found that the federally insured bank had understated its "scheduled items"[1] by approximately $10 million. The FHLBB therefore ordered EPF to strengthen its net worth.[2] Robert Payne, EPF's president at that time, responded that the

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[1] Scheduled items are delinquent loans that have been modified. The modification usually is an extension or renewal of the loan.

[2] Under federal regulations, a federally insured financial institution's minimum net worth must be equal to 20 percent of its scheduled items.

bank intended to sell approximately $5 million of scheduled loans. The FHLBB, however, became concerned that EPF would sell those loans "with recourse" to another financial institution, Sun Country Savings Bank (SC), which was then headed by Raymond Chavez. If the loans were sold with recourse, EPF would remain secondarily liable for the loans, and its net worth would still be insufficiently low. The FHLBB therefore asked Payne and Chavez in April 1985 whether EPF intended to sell the loans with recourse to SC. Chavez and Payne responded separately the following month. Chavez stated that SC had not entered into any transaction with EPF and that, if it did, SC would notify the FHLBB. Several weeks before, however, Chavez had committed SC to participating in EPF's sale of the loans to the El Paso Electric Company (EPEC). Payne, meanwhile, informed the FHLBB that EPF intended to sell the loans to EPEC. Payne did not indicate, as the FHLBB had requested, whether the sale would be with or without recourse.

In late May 1985, EPF's board of directors held a meeting and discussed the proposed transaction between EPF and EPEC. According to two board members who testified at trial, Payne never indicated that the proposed sale was with recourse. Billye Bostic, who was then executive vice president of EPEC, attended the board meeting. Bostic had been a director of EPF and later became an advisory director to the bank. Bostic also did not indicate whether the proposed sale would be with or without recourse. EPF's board held another meeting in early June 1985 and again discussed the proposed sale. Again, neither Payne nor Bostic mentioned that the sale would be with recourse.

EPF eventually sold the loans with recourse to EPEC in late June 1985 for $5.5 million. The loans sold to EPEC were made to Meacham Construction Company. Under the terms of the sale, EPF agreed to re-purchase the loans one year after the date of sale. EPF posted an additional $10 million in loans as collateral for its obligation to repurchase the delinquent construction loans. SC, for its part, provided a "take out" commitment to EPEC, by which SC agreed to purchase the loans from EPEC one year after the date of sale. EPEC paid SC $5,000 for its commitment, whereupon EPF reimbursed EPEC. In effect, SC's commitment to purchase the loans meant that SC initially would be liable for the loans, and in the event that SC defaulted on its obligation, EPF would become liable, i.e., obligated to re-purchase the loans.

The transaction was memorialized in two separate documents. The Loan Participation Agreement (LPA) originally included reference to EPF's contingent repurchase obligation, but the reference eventually was deleted. The reference was deleted by an outside attorney at the direction of Gary Hedrick, an EPEC employee. Hedrick testified at trial that he did not recall who ordered him to direct the attorney to delete the reference. He further testified that only three EPEC officers, including Bostic, would have been authorized to do so. The LPA in its final form represented that the transaction was an outright sale without recourse. Though the LPA was one of two documents reflecting the sale, it stated: "this document contains the entire agreement between the parties hereto." The Collateral Assignment and Security Agreement (CASA), the second document, set forth the details

of EPF's contingent repurchase obligations and the collateralization of those obligations. The CASA referred to the LPA, but the LPA did not refer to the CASA. At closing, Bostic signed on behalf of EPEC and Robert Hawley signed on behalf of EPF. Neither Payne nor Chavez were present at closing. The CASA – but not the LPA – was filed at the El Paso County Courthouse.

Several days later, Robert Carvalho, the EPF employee responsible for making ledger entries, recorded the transaction. Though he was aware that the transaction was collateralized and with recourse, Carvalho's office recorded it as an outright sale without any reference to EPF's liability. Shortly thereafter, Susan Long, EPF's comptroller, prepared EPF's quarterly report to be submitted to FHLBB. Long testified that she used the ledger prepared by Carvalho to compile the quarterly report, and as a result, she did not report that EPF had sold the loans to EPEC with recourse.

Meanwhile, at SC, the transaction was never recorded. Specifically, Chavez's "take out" commitment in April 1985 was never entered into SC's financial statements. In addition, the SC board met twice in May 1985 and once in June 1985. According to the board's minutes, SC's commitment to EPEC was never discussed by the board. The transaction also went unrecorded at EPEC. In fact, the only reference in EPEC's records of the transaction is in the minutes of an EPEC investment review committee that met in May 1985, a month prior to the transaction. Bostic represented to the committee that EPEC would loan EPF $5.4 million and EPF would collateralize the loan. On the same day of the committee's

meeting, however, Bostic had committed EPEC to *buying* the loans.

In October 1985, the FHLBB expressed to EPF its renewed concerns over the bank's financial stability and recommended that EPF permit the FHLBB to supervise the bank. In response, EPF's board met, with Payne and Bostic in attendance, and approved a letter to the FHLBB that discussed the EPF/EPEC transaction. The letter does not mention that the sale was with recourse. The board attached a copy of the LPA but *not* the CASA. In late December 1985, approximately six months after the transaction, EPF repurchased the loans directly from EPEC. SC apparently played no transactional role in the repurchase. At two separate EPF board meetings the following month, the board did not consider whether EPF should have repurchased the loans. Instead, the repurchase apparently was couched as a favor for EPEC, who allegedly was under pressure from utility regulators to sell the loans. The board's minutes do not indicate whether Payne and/or Bostic were present.

In late January 1986, just days after EPF had completed its repurchase, the FHLBB and EPF entered into a supervisory agreement, which provided, *inter alia*, that EPF would be unable to repurchase scheduled loans. Pursuant to the supervisory agreement, Payne was required to complete a management questionnaire that asked for information regarding EPF's (1) existing liabilities and contingent liabilities and (2) existing agreements which affected the bank's financial condition but were not recorded. Payne responded in April 1986 that no such liabilities or agreements existed at that time. In addition to signing a supervisory agreement with EPF,

the FHLBB commenced another examination of EPF in May 1986. William Couhig, the FHLBB examiner, questioned Payne about the EPF/EPEC transaction. Payne stated that EPF was under no obligation to repurchase the loans and that the repurchase was intended as a favor for EPEC, an EPF depositor. Payne stated that the EPF board, in fact, had voted at the May 1985 meeting to repurchase the loan, though the minutes do not reflect a vote. Payne did not reveal the CASA to Couhig.

B.

In December 1992, Payne, Bostic and Chavez were jointly and individually charged in an eight-count indictment. Count 1, the conspiracy charge, involves the whole sequence of events. It alleges that all three of the defendants conspired (1) to make false entries in the records of a financial institution, and (2) to make material false statements to a federal officer. Count 2 involves the May 1985 EPF board meeting. It alleges that Payne, aided and abetted by Bostic, made false entries in EPF's records when he failed to disclose to the directors that the transaction was with recourse.

Count 3 involves EPF's ledger. It alleges that Payne caused a false entry to be made in EPF's ledger when he did not specifically direct Carvalho to record the transaction as one that was collateralized and with recourse. Count 4 involves the quarterly report from EPF to the FHLBB. It alleges that Payne caused a false entry to be made in the report when he did not specifically direct Long to report the transaction as one that was collateralized and with recourse.

Counts 5 and 6 involve the management questionnaire. It alleges that Payne made a false entry in the questionnaire in April 1986 when he stated that EPF had (1) no contingent liabilities and (2) no unrecorded agreements affecting the financial condition of EPF. Count 7 involves Payne's response to the FHLBB's request in April 1985 as to whether EPF would sell the loans with or without recourse. It alleges that Payne made a false statement to a federal officer when he represented that the transaction would be an outright sale. Count 8 involves Payne's interview with FHLBB examiner Couhig. It alleges that Payne made a false statement to Couhig, a federal officer, when he stated that EPF was under no obligation to repurchase the loans from EPEC.

In March 1993, Bostic and Chavez moved to sever their trials. They argued that Payne would provide exculpatory testimony only if Bostic and Chavez were tried separately, and alternatively that the weight of evidence implicating Payne alone would "spill over" and prejudice their respective defenses. Within a week of the filing of the motion to sever, Payne and the government began plea negotiations. The parties discussed the possibility of conditioning Payne's plea on his agreement not to testify on behalf of Bostic and Chavez. In response, Bostic and Chavez moved for a dismissal of the government's case on the ground that the proposed plea constituted prosecutorial misconduct. The district court held a hearing *in camera* and denied both the motion to sever and the motion to dismiss.

The court then commenced trial. After three days, Payne was convicted of Counts 1, 2, 3, 4, 5, 6 and 8[3], and he was sentenced to three years of imprisonment. Bostic was convicted of Counts 1 and 2 and was sentenced to two years of imprisonment. Chavez, convicted of Count 1 only, was sentenced to 18 months of imprisonment. Payne, Bostic and Chavez now appeal the sufficiency of the evidence to support their convictions. They also appeal the district court's denial of the motion to dismiss on the ground of prosecutorial misconduct. Finally, Bostic and Chavez appeal the district court's denial of their motion to sever.

II.

A.

We review the denial of a motion to sever for abuse of discretion. *United States v. Rocha*, 916 F.2d 219, 227 (5th Cir. 1990). To establish that a court has abused its discretion, a defendant must show that he suffered specific and compelling prejudice against which the district court could not provide adequate protection, and that this prejudice resulted in an unfair trial. *Id.* We find that the district court in this case did not abuse its considerable discretion. While Payne had been charged with substantially more criminal counts than had Bostic and Chavez, all three were charged with conspiracy. Thus, whether the defendants were charged separately or together, the government would have marshalled the same quantum of

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[3] Payne was acquitted of Count 7 at the close of the evidence.

evidence in prosecuting the conspiracy count. The district court's denial of the motion to sever is affirmed.

B.

We affirm a jury's verdict if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We therefore " 'must view the evidence in the light most favorable to the verdict, accepting all credibility choices and reasonable inferences made by the jury.' " *United States v. McCord*, 33 F.3d 1434, 1439 (5th Cir. 1994) (quoting *United States v. Gardea Carrasco*, 830 F.2d 41, 43 (5th Cir. 1987)). With regard to the conspiracy charge, we find that a jury could rationally conclude beyond a reasonable doubt from this evidence that the defendants conspired to conceal the nature of the transaction and, therefore, conspired to defraud a bank and to deceive federal officers. In making its case, the government proffered an abundance of evidence regarding the EPF/EPEC transaction. The government, in essence, argued below that bank officers with the breadth of banking experience the defendants have would never have conducted themselves as the defendants did *unless* they intended to conceal the true nature of such a transaction. The jury arrived at the same conclusion, and we do not find that conclusion an unreasonable one. The defendants' conspiracy convictions are affirmed.

With regard to the convictions for the underlying substantive offenses, we affirm each of those with one exception. Count 5 charged Payne with making a false statement in a FHLBB questionnaire that requested the

following: "List all liabilities and all contingent liabilities (except current accruals) which are not recorded on the general books." Payne answered, "None." Payne points out that the request is in the *present* tense. By the time Payne completed the form in April 1986, EPF had already repurchased the loans. Payne therefore contends that he did not make a false statement. We agree and reverse his conviction as to Count 5.

C.

Finally, the defendants appeal several of the district court's rulings with regard to alleged prosecutorial misconduct. The first appeal stems from the plea negotiations between the government and Payne. The government stated at the *in camera* hearing that it was concerned that Payne would perjure himself if he testified on be half of Bostic and Chavez. Claiming it would not suborn such perjury, the government therefore proposed that Payne plea to one count on the condition that he not testify. The defendants claim that the government's tactic violated their due process rights because it intimidated Payne into *not* testifying. We disagree. To begin with, we recognize that we typically condemn plea agreements that forbid the pleading party from testifying on behalf of his co-conspirators. *See United States v. Hendricksen*, 564 F.2d 197, 198 (5th Cir. 1977). Payne, however, never entered a plea agreement with the government. In addition, we have established that "[t]he prosecutor's hands are not tied so tightly as to prevent good faith efforts to avert perjury." *United States v. Whittington*, 783 F.2d 1210, 1219 (5th Cir. 1986). Thus, to the extent that the government's thinly veiled warning of

possible prosecution was the critical factor in Payne's decision not to testify, we find that the government's strategy does not amount to a violation of the defendants' due process rights.

The remaining appeals involve the government's examination of witnesses and its closing argument. We do not view a prosecutor's comments in isolation, but rather in the context of the entire trial. *United States v. Young*, 470 U.S. 1, 11 (1985). The dispositive question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict. *United States v. Kelly*, 981 F.2d 1464, 1473 (5th Cir. 1993). After reviewing the trial transcript, we find the prosecutor's remarks in this case do not undermine the reliability of the jury's verdicts.

III.

The defendants' convictions, with the exception of Payne's convictions as to Count 5, are AFFIRMED. Payne's convictions as to Count 5 is VACATED. Because we have vacated the conviction on Count 5, we REMAND the case to the district court for re-sentencing as the district court may deem appropriate.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8540

D.C. Docket No. EP-92-CR-447-1, 2, 3(B)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BILLYE E. BOSTIC,

Defendant-Appellant.

Appeals from the United States District Court for the Western District of Texas

Before REAVLEY, DAVIS, and DeMOSS, Circuit Judges.

JUDGMENT

(Filed Nov. 23, 1994)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

November 23, 1994

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8540

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAYMOND D. CHAVEZ,
ROBERT M. PAYNE and
BILLYE E. BOSTIC,

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

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ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 11/23/94, 5 Cir., ___ F.3d ___)

(January 18, 1995)

Before REAVLEY, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:

(✔) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who

are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R DeMoss
United States Circuit Judge

AMENDED 8/4/93

UNITED STATES DISTRICT COURT for WESTERN DISTRICT OF TEXAS EL PASO DIVISION

DOCKET NO. → EP-92-CR-447 B (02)

DEFENDANT

United States of America vs. BILLYE E. BOSTIC

JUDGMENT AND PROBATION/ COMMITMENT ORDER

A0 245 (9/82)

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH DAY YEAR
JULY 27, 1993

COUNSEL

[_] **WITHOUT COUNSEL** However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] **WITH COUNSEL**
[Stephen B. Edwards and Robert C. Alden]
(Name of Counsel)

PLEA

[_] **GUILTY,** and the court being satisfied that there is a factual basis for the plea,
[_] **NOLO CONTENDERE,** [_] **NOT GUILTY**

FINDING & JUDGMENT

There being a verdict of { [_] **NOT GUILTY.**
Defendant is discharged

{ [X] **GUILTY.**
by jury as to Counts 1 and 2 of the Indictment on 03/18/93

Defendant has been convicted as charged of the offense(s) of

COUNT ONE – Conspiracy to Make False Entries and Statements, in violation of Title 18, United States Code, Sections 371, 1001, & 1006; **COUNT TWO – Aiding & Abetting the Making of False Entries,** in violation of Title 18, United States Code, Section 2 and 1006.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary has shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of **two (2) years on COUNT ONE,** under the provisions of Title 18, United States Code, Section 4205(a).

Imposition of sentence is suspended on COUNT TWO, and the defendant is placed on probation with supervision for a period of five (5) years, to run **CONSECUTIVE** to the term of imprisonment imposed in Count One.

SPECIAL CONDITIONS OF PROBATION

It is further ordered that the defendant shall immediately pay a special assessment of $100 ($50 for each Count), pursuant to Title 18, United States Code, Section 3013 for Counts 1 and 2 of the Indictment.

OPTIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation reduce or extend the period of probation, and on any time during the probation period or within a maximum probation period of five years permitted by law may issue a warrant and revoke probation for a citation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends. The defendant shall contact the U.S. Marshal Service, El Paso, Texas, not later than 10:00 a.m. on August 30, 1993, to ascertain to which institution he is to report and shall report as directed. Recommended: FCI, La Tuna, Anthony, NM/TX; FPC, El Paso, TX; OR FCI, Big Spring, TX.

If appeal is filed present bon [sic] will stand as appeal bond same conditions of release.

[It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.]

SIGNED BY

[XX] U.S. District Judge

[__] U.S. Magistrate

/s/ Lucius D. Bunton
LUCIUS D. BUNTON
Date July 27, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL NO. EP-92-CR-447-B**
Plaintiff,	)	**INDICTMENT**
v.	)	**(Vio: 18:371 – Conspiracy; 18:1001 – False Statements; 18:1006 – False Entries; 18:2 – Aiding & Abetting)**
ROBERT M. PAYNE, BILLYE E. BOSTIC, RAYMOND D. CHAVEZ,	)	
Defendants.	)	

The Grand Jury charges:

COUNT ONE
(18 U.S.C. § 371)

INTRODUCTION

AT ALL TIMES MATERIAL TO THIS INDICTMENT:

1. The Federal Savings and Loan Insurance Corporation (FSLIC) was an agency of the United States established to protect depositors by insuring deposits in savings and loan institutions in amounts up to $100,000.00 (one hundred thousand dollars) per account. The FSLIC was governed by the Federal Home Loan Bank Board (FHLBB).

2. The Federal Home Loan Bank Board (FHLBB) was an agency of the United States established to regulate and supervise savings and loan institutions whose accounts were insured by the FSLIC. As part of its duties, the FHLBB examined insured institutions to assure that

they were operated in a safe and sound manner and in conformity with applicable laws and regulations.

3. El Paso Federal Savings and Loan (El Paso Savings) was a financial institution located at 517 North Kansas Street, El Paso, Texas. The accounts of El Paso Savings were insured by FSLIC.

4. The El Paso Electric Company (El Paso Electric) was a public utility company that, amongst other things, provided electrical service to residential and commercial customers in the El Paso, Texas, and Southern New Mexico area. El Paso Electric had excess funds available as a result of a major borrowing which would eventually be used in connection with the Palo Verde nuclear power plant. El Paso Electric used these funds to make short term investments that were either insured or fully collateralized.

5. Sun Country Savings Bank (Sun Country) was a financial institution located at 1155 Telshore Boulevard, Las Cruces, New Mexico. The accounts of Sun Country were insured by the FSLIC.

6. A Supervisory Agreement is an enforcement action imposed by the FHLBB on a savings and loan institution under their supervision, when the FHLBB, as a result of an examination, discovers deficiencies or regulatory violations at the savings and loan institution that require immediate correction and close scrutiny by the FHLBB regulators. A financial institution is notified of the term, conditions, and constraints of a Supervisory Agreement at least one month prior to the issuance of the written agreement and is expected and required to comply with those terms immediately, on verbal notification.

Under a Supervisory Agreement, a savings and loan institution must notify the FHLBB to obtain their approval before entering into the types of transaction that are included in the Supervisory Agreement.

7. Sun Country was placed under a Supervisory Agreement by the FHLBB on May 29, 1985.

8. El Paso Savings was placed under a Supervisory Agreement by the FHLBB on January 31, 1986.

9. Supervisory agents were individuals employed by the FHLBB who, under guidelines established by the FHLBB, supervised one or more FSLIC insured savings and loan institutions.

10. A Scheduled Item, as that term is used in the savings and loan industry and by the FHLBB, is a loan that is modified while it is in a contractually delinquent status. The modification is usually an extension or renewal of the loan. Savings and loan institutions must accurately report all scheduled items to the FHLBB examiners. If a savings and loan institution has too many scheduled items, they may be required to inject additional capital into the institution to increase the institution's net worth and strengthen the financial instability of the savings and loan institution.

11. Defendant, **Robert M. Payne,** was the President, Chief Executive Officer and Chairman of the Board of El Paso Savings.

12. Defendant, **Billye E. Bostic,** was the Chief Financial Officer, Executive Vice President and a member of the Board of Directors of El Paso Electric Company. Defendant **Bostic** had resigned as a director of El Paso

Savings in the late fall of 1984, but was elected to the position of adivsory [sic] director of El Paso Savings on January 16, 1985, and continued to attend board meetings in that capacity.

13. Defendant, **Raymond D. Chavez,** was the President and Chief Executive Officer of Sun Country. Defendant **Chavez** was formerly an auditor and examiner with the FHLBB, Savings and Loan Supervisor in the State of New Mexico, and had been associate director of the Office of Housing and Urban Affairs of the FHLBB in Washington, D.C.

MANNER AND MEANS OF THE CONSPIRACY

It was part of the conspiracy that:

14. On or about the early part of 1985, and before April 26, 1985, Defendants, **Robert M. Payne** and **Raymond D. Chavez,** entered into an agreement to provide loans to the directors of each other's savings and loan institutions so that the directors could purchase a controlling interest in their own savings and loan. **Robert M. Payne** agreed that his institution, El Paso Savings, would lend money to each of the directors of Sun Country, so that each director might purchase Sun Country stock to increase their ownership percentage. **Raymond D. Chavez** agreed that his institution, Sun Country, would make stock loans to El Paso Savings directors to enable them to change the status of El Paso Savings from a mutually held savings and loan institution to a stock ownership institution.

15. El Paso Savings lent seven (7) directors of Sun Country a total of approximately $1,500,000.00 (one million, five hundred thousand dollars) so that they could purchase a controlling interest in Sun Country.

16. Sun Country did not extend loans to any directors of El Paso Savings. El Paso Savings did not get approval to convert from a mutually held savings and loan institution to a stock ownership savings and loan institution.

17. Defendant, **Billye E. Bostic**, resigned from the El Paso Savings board of directors in late 1984 and was elected to the El Paso Savings board of directors as an advisory director so that he might continue to attend El Paso Savings Board meetings but avoid the appearance of impropriety when representing El Paso Electric in loan transactions with El Paso Savings.

18. The Defendant, **Billye E. Bostic**, failed to inform the members of the board of El Paso Electric, at their May 16, 1985, meeting to approve the purchase of a package of 21 loans from El Paso Savings, that any of the loans were delinquent.

19. Defendant, **Raymond D. Chavez**, did not inform the board of directors of Sun Country that he had written a letter of commitment to El Paso Electric, obligating Sun Country to purchase over five million dollars in loans from El Paso Electric, within a year from the date El Paso Electric purchased the loans from El Paso Savings; nor did he give the Sun Country board an opportunity to discuss and vote on the making of that commitment.

20. Defendant, **Raymond D. Chavez,** did not advise the FHLBB that he intended to commit or subsequently did commit Sun Country to purchase over five million dollars in loans from El Paso Electric within a year of the date that El Paso Electric purchased those loans from El Paso Savings.

21. Defendant, **Robert M. Payne,** instructed an employee of El Paso Savings (who was not familiar with the loan sale agreement between El Paso Savings, El Paso Electric and Sun Country) to represent El Paso Savings at the meeting held to accomplish the sale of over five million dollars in loans by El Paso Savings to El Paso Electric, and caused that same employee to sign the documents evidencing that sale.

THE CONSPIRACY AND ITS OBJECTS

22. Beginning in or about December 1984, and continuing through in or about July, 1986, the exact dates being unknown to the Grand Jury, in the Western District of Texas, the Northern District of Texas, and the District of New Mexico, the Defendants,

ROBERT M. PAYNE
BILLYE E. BOSTIC
RAYMOND D. CHAVEZ,

knowingly and willfully conspired, combined, confederated, and agreed with each other, and with others both known and unknown to the Grand Jury to commit certain offenses against the United States, namely:

A. knowingly and willfully make and cause to be made, by an officer of El Paso Savings, material false

entries in the books, reports and statements of El Paso Savings, a financial institution whose deposits were insured by the FSLIC, with the intent to defraud El Paso Savings and to deceive the auditors, examiners, and agents of the FHLBB, an agency of the United States, in violation of Title 18, United States Code, Section 1006; and

B. knowingly and willfully, in matters within the jurisdiction of the FSLIC and the FHLBB, agencies of the United States, falsify, conceal and cover up material facts by the use of tricks, schemes and devices, and did make and cause to be made, false and fraudulent statements and representations knowing the same to be false in violation of Title 18, United States Code, Section 1001.

OVERT ACTS

23. In furtherance of the conspiracy and in order to effect its objects, Defendants, **Robert M. Payne, Billye E. Bostic, Raymond D. Chavez,** and others known and unknown to the grand jury, committed and caused to be committed the following overt acts, among others, in the Western District of Texas, the District of New Mexico and elsewhere:

(1) On or about December 31, 1984, at the Defendant, **Robert M. Payne's**, direction, his agents, in a report to the FHLBB under-reported the dollar amount of scheduled items held by El Paso Savings as $3,512,188.00 (three million, five hundred twelve thousand, one hundred eighty-eight dollars); a sum that would have required an injection of only approximately $600,000.00 (six hundred

thousand dollars) of capital into El Paso Savings to maintain the minimum net worth required by the FHLBB.

(2) On or about April 30, 1985, Defendant, **Raymond D. Chavez,** signed a letter of commitment obligating Sun Country to purchase from El Paso Electric, the balance remaining, plus accrued interest, on $5,469,578.42 (five million, four hundred sixty-nine thousand, five hundred seventy-eight dollars and forty-two cents) worth of loans, sold to El Paso Electric by El Paso Savings, within one year from the date of El Paso Electric's purchase.

(3) Defendant, **Raymond D. Chavez,** received a check paid to the order of Sun Country Savings from El Paso Electric for $5,000.00 (five thousand dollars) as a "take-out" fee for the letter of commitment referred to in Over Act (2) above.

(4) Defendant, **Robert M. Payne,** by his agent, an El Paso Savings employee, caused El Paso Savings to issue check # 312757, on July 24, 1985, paid to the order of El Paso Electric to reimburse El Paso Electric for their payment to Sun Country for Defendant **Raymond D. Chavez'** commitment letter referred to in Overt Act (2) above.

(5) On or about the Spring of 1985, and before May 22, 1985, the Defendants, **Robert M. Payne** and **Biliye E. Bostic** entered into a secret agreement wherein, Defendant **Robert M. Payne,** committed El Paso Savings to repurchase the balance of the $5,469,578.42 (five million, four hundred sixty-nine thousand, five hundred seventy-eight dollars and forty-two cents) worth of loans that El Paso Savings had sold to El Paso Electric, within one year of the sale in the event Sun Country could not or would

not honor the commitment of **Raymond D. Chavez** to buy the loan balances as referred to in Over Act (2) above.

(6) On or about May 22, 1985, Defendants, **Robert M. Payne** and **Billye E. Bostic,** attended a meeting of the Board of Directors of El Paso Savings where Defendant, **Robert M. Payne** represented that the nature of the sale to El Paso Electric of a package of 21 loans was an outright sale, that would cause El Paso Savings to comply with the directives of the FHLBB to remove millions of dollars of scheduled items from the books of El Paso Savings.

(7) On or about May 21, 1985, Defendant, **Billye E. Bostic,** telephoned a lawyer for El Paso Electric, and advised the lawyer that Sun Country Savings *and* El Paso Savings would both be obligated to repurchase, within one year of the date of sale, the balance on the package of loans being bought by El Paso Electric from El Paso Savings.

(8) On or about June 19, 1985, the Defendant, **Billye E. Bostic,** by an employee of El Paso Electric, caused an attorney for El Paso Electric, to delete *all* references to El Paso Savings' commitment to repurchase the balance of the loans sold to El Paso Electric on June 27, 1985, from the Loan Participation Agreement, the principle document evidencing the sale of the loans.

(9) On or about June 27, 1985, the Defendants, **Robert M. Payne** and **Billye E. Bostic,** caused El Paso Savings to sell and El Paso Electric to buy a package of 21 loans including some scheduled items and delinquent loans, worth $5,469,578.42 (five million, four hundred

sixty-nine thousand, five hundred seventy-eight dollars and forty-two cents).

(10) On or about June 27, 1985, the Defendant, **Robert M. Payne,** by his agent, a vice president of El Paso Savings, caused each individual note sold to El Paso Electric to be stamped "without recourse" on the back.

(11) On January 9, 1986, 22 days before El Paso Savings was placed under a Supervisory Agreement by the FHLBB, Defendant, **Robert M. Payne,** caused El Paso Savings to buy back $2,102,274.24 (two million, one hundred two thousand, two hundred seventy-four dollars and twenty-four cents) of loans that had been sold to El Paso Electric on June 27, 1985.

(12) On January 30, 1986, the day before El Paso Savings was placed under a Supervisory Agreement by the FHLBB, Defendant, **Robert M. Payne,** caused El Paso Savings to buy back the remaining $2,520,316.47 (Two million, five hundred twenty thousand, three hundred sixteen dollars and forty-seven cents) of loans sold to El Paso Electric on June 27, 1985.

(13) On a date between May 31, 1986, and July 12, 1986, during an interview conducted by FHLBB Examiner-in-Charge, William Couhig, the Defendant, **Robert M. Payne,** said El Paso Savings was under no obligation to repurchase loans sold to El Paso Electric, that Sun Country had only made a verbal commitment to purchase the loans from El Paso Electric and that the reason El Paso Savings repurchased the loans from El Paso Electric was because the institution had a favorable deposit relationship with El Paso Electric, all in violation of Title 18, United States Code, Section 371.

COUNT TWO
(18 U.S.C. §§ 1006 and 2)
(ROBERT M. PAYNE AND BILLYE E. BOSTIC)

1. The Grand Jury realleges and incorporates herein, as if set forth in full, paragraphs 1-10, and 13 of Count One of this Indictment.

2. On or about May 22, 1985, in the Western District of Texas, the Defendant, **Robert M. Payne,** the President Chairman of the Board of Directors and director of El Paso Savings, a financial institution whose accounts were insured by the FSLIC, aided and abetted by Defendant, **Billye E. Bostic,** who was on that date, an advisory director of El Paso Savings, and an officer and director of the El Paso Electric Company, with the intent to defraud El Paso Savings and to deceive the auditors, examiners and agents of the FHLBB, an agency of the United States, willfully and knowingly made and caused to be made a material false entry in the books and reports of El Paso Savings and made and caused to be made a material false statement to the Board of Directors of El Paso Savings, in that the defendants falsely and fraudulently represented, to the El Paso Savings Board of Directors that the agreement between El Paso Savings to sell and El Paso Electric to purchase approximately $5,500,000.00 (five million, five hundred thousand dollars) worth of loans, including some delinquent loans, was a sale without recourse (with no legal duty or obligation to repurchase those loans) that would put El Paso Savings in a better financial position, and cause El Paso Savings to comply with the orders of the FHLBB examiners to rid the institution of a substantial number of scheduled items or delinquent loans, when the defendants knew, that in truth and in fact, the sale

was with recourse (with a legal duty to repurchase the loans under certain circumstances) that El Paso Savings had contractually promised El Paso Electric to buy back the loans, under certain conditions, and that El Paso Savings was not in compliance with the directives of the FHLBB, all in violation of Title 18, United States Code, Sections 1006 and 2.

COUNT THREE
(18 U.S.C. § 1006)

(ROBERT M. PAYNE)

1. The Grand Jury realleges and incorporates herein, as if set forth in full, paragraphs 1-10, and 13 of Count One of this Indictment.

2. On or about July 1, 1985, in the Western District of Texas, the Defendant, **Robert M. Payne,** the President, Chairman of the Board of Directors and director of El Paso Savings, a financial institution whose accounts were insured by the FSLIC, with the intent to deceive the auditors, examiners, and agents of the FHLBB, an agency of the United States, willfully and knowingly made and caused to be made a material false entry in the books and reports of El Paso Savings, in that the Defendant, **Robert M. Payne,** caused the General Ledger History Listing (General Ledger) to reflect that loans were made by El Paso Savings to El Paso Electric for $5,500,478.42 (five million, five hundred thousand, four hundred seventy-eight dollars and forty-two cents), as a straight forward sale, without recourse, with no obligation to repurchase the loans under any circumstances, an entry which caused the records and books of El Paso Savings to falsely

reflect that the loans sold to El Paso Electric had been taken off the books of El Paso Savings as a liability, when **Robert M. Payne** knew, that in truth and in fact, the loans had been sold to El Paso Electric with recourse, an obligation to repurchase the loans from El Paso Electric within one year of the date of sale, under certain circumstances, and the books and records of El Paso Savings should have reflected that El Paso Savings had a contingent liability with regard to $5,500,478.42 (five million, five hundred thousand, four hundred seventy-eight dollars and forty-two cents) worth of loans, all in violation of Title 18, United States Code, Section 1006.

COUNT FOUR
(18 U.S.C. § 1006)

(ROBERT M. PAYNE)

1. The Grand Jury realleges and incorporates herein, as if set forth in full, paragraphs 1-10, and 13 of Count One of this Indictment.

2. On or about June 30, 1985, in the Western District of Texas, the Defendant, **Robert M. Payne,** the President, Chairman of the Board of Directors and director of El Paso Savings, a financial institution whose accounts were insured by the FSLIC, with the intent to deceive the auditors, examiners, and agents of the FHLBB, an agency of the United States, willfully and knowingly made and caused to be made a material false entry in the books and reports of El Paso Savings, in that the Defendant, **Robert M. Payne,** caused the FHLBB Quarterly Financial Report – Statement of Condition (Quarterly Statement), to falsely reflect that no commitments to purchase loans had been

made by El Paso Savings, when the defendant knew, that in truth and in fact, the Quarterly Statement should have reflected the loan sale to El Paso Electric as "Amount of Contingency to Repurchase Loans" (Section F, Line # 400), in violation of Title 18, United States Code, Section 1006.

COUNT FIVE
(18 U.S.C. § 1006)

(ROBERT M. PAYNE)

1. The Grand Jury realleges and incorporates herein, as if set forth in full, paragraphs 1-10, and 13 of Count One of this Indictment.

2. On or about April 30, 1986, in the Western District of Texas, the Defendant, **Robert M. Payne,** the President, Chairman of the Board of Directors and director of El Paso Savings, a financial institution whose accounts were insured by the FSLIC, with the intent to deceive the auditors, examiners and agents of the FHLBB, an agency of the United States, willfully and knowingly made and caused to be made a material false entry in the books and reports of El Paso Savings, in response to question number 16 of the "Management Questionnaire", a document prepared by **Robert M. Payne** as part of the examination of El Paso Savings conducted by the FHLBB, – "List all liabilities and all contingent liabilities (except current accruals) which are not recorded on the general books," the Defendant, **Robert M. Payne,** responded, "None," when the defendant knew, that in truth and in fact, El Paso Savings had over five million dollars in contingent liabilities between June 27, 1985, and January

30, 1986, in connection with the loans sold to El Paso Electric with an agreement to repurchase the loans, under certain circumstances within a year of the date of sale to El Paso Electric, in violation of Title 18, United States Code, Section 1006.

COUNT SIX
(18 U.S.C. § 1006)

(ROBERT M. PAYNE)

1. The Grand Jury realleges and incorporates herein, as if set forth in full, paragraphs 1-10, and 13 of Count One of this Indictment.

2. On or about April 30, 1986, in the Western District of Texas, the Defendant, **Robert M. Payne,** the President, Chairman of the Board of Directors and director of El Paso Savings, a financial institution whose accounts were insured by the FSLIC, with the intent to deceive the auditors, examiners and agents of the FHLBB, an agency of the United States, willfully and knowingly made and caused to be made a material false entry in the books and reports of El Paso Savings, in response to question number 17 of the "Management Questionnaire," a document prepared by **Robert M. Payne** as part of the examination of El Paso Savings conducted by the FHLBB, – "Furnish details of each oral or written agreement not recorded on the institution's permanent records which affect the financial condition of the institution. State where the information is located and what person knows the facts about such agreement," the Defendant, **Robert M. Payne,** responded "None," when the defendant knew, that in truth and in fact, El Paso Savings had entered into

an agreement to repurchase over five million dollars in loans, some of which were scheduled items and delinquent, within a year of the date of sale to El Paso Electric, under certain circumstances, and the defendant knew that **Billye E. Bostic,** an El Paso Savings employee, and others knew about such agreement and knew where the information was located, in violation of Title 18, United States Code, Section 1006.

COUNT SEVEN
(18 U.S.C. § 1001)

(ROBERT M. PAYNE)

1. The Grand Jury realleges and incorporates herein, as if set forth in full, paragraphs 1-13 of Count One of this Indictment.

2. On or about May 22, 1985, in the Western District of Texas, and the Northern District of Texas, the Defendant, **Robert M. Payne,** in a matter within the jurisdiction of the FHLBB, an agency of the United States, did willfully and knowingly make a material false, fraudulent and fictitious statement, when the defendant knew the statement was false, fraudulent and fictitious, that is to say the defendant, in a letter dated May 22, 1985, to FHLBB Supervisory Agent, James W. Smith, did falsely and fraudulently represent that the commitment on the part of El Paso Electric to purchase $5,500,000.00 (five million, five hundred thousand dollars) of loans classified by the FHLBB examiners as scheduled items in their April 1985 examination of El Paso Savings, was only an agreement to purchase those loans for cash at face value,

when the defendant knew that additionally, the agreement between El Paso Savings and El Paso Electric included a commitment on the part of El Paso Savings to repurchase the loans, under certain circumstances, within a year of the date of sale, which false statement caused the FHLBB to erroneously believe that certain deficiencies at El Paso Savings with regard to compliance with regulations involving scheduled items had been eliminated, when the Defendant, **Robert M. Payne,** knew, that in truth and in fact, they had not, in violation of Title 18, United States Code, Section 1001.

COUNT EIGHT
(18 U.S.C. § 1001)

(ROBERT M. PAYNE)

1. The Grand Jury realleges and incorporates herein, as if set forth in full, paragraphs 1-13 of Count One of this Indictment.

2. On or about a date between May 31, 1986, and July 12, 1986, in the Western District of Texas, the Defendant, **Robert M. Payne,** in a matter within the jurisdiction of the FHLBB, an agency of the United States, did willfully and knowingly make a material false statement, that is, in an interview conducted with the defendant by FHLBB examiner, William Couhig, who was, at that time, the Examiner-in-Charge (EIC) of the FHLBB May 31, 1986, examination of El Paso Savings, when asked by EIC Couhig whether El Paso Savings was under any obligation to repurchase the "Meacham" loan, one loan in the package of 21 loans sold to El Paso Electric, Defendant **Robert M. Payne,** responded "no" and advised Couhig

that Sun Country had verbally committed to purchase the "Meacham" loan from El Paso Electric after one year, but that since Sun Country had refused to honor their commitment, El Paso Savings repurchased the loan because El Paso Electric had a favorable deposit relationship with El Paso Savings, when the Defendant, **Robert M. Payne,** knew that his response was false and fraudulent in that El Paso Savings was contractually obligated to repurchase the "Meacham" loan, Sun Country had executed a written letter of commitment to repurchase the loan, and El Paso Savings' primary reason for repurchasing the "Meacham" loan was that El Paso Savings was under a legal duty to do so, in violation of Title 18, United States Code, Section 1001.

A TRUE BILL.

/s/ illegible
FOREPERSON OF THE
GRAND JURY

RONALD F. EDERER
UNITED STATES ATTORNEY

BY: /s/ Debra P. Kanof
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

THE UNITED STATES OF AMERICA	§	NO. EP-92-CR-447B(2)
V.	§	
ROBERT PAYNE, BILLYE E. BOSTIC, AND RAYMOND CHAVEZ	§	

MOTION FOR SEVERANCE

(Filed March 5, 1993)

TO THE HONORABLE JUDGE LUCIUS D. BUNTON:

Comes now BILLYE E. BOSTIC, Defendant, and makes this Motion For Severance pursuant to Rule 14, Federal Rules of Criminal Procedure, and requests relief from prejudicial joinder with Defendant Robert Payne, and in support of such Motion will show the Honorable Court the following:

1. The Defendant, Billye E. Bostic, has been charged by this indictment together with Defendant Robert Payne.

2. The indictment charges Defendant, Billye E. Bostic, with conspiring to make and aiding and abetting the making of false entries in the books and records of El Paso Federal Savings and Loan (18 U.S.C. §§ 2, 371, and 1006).

3. As shown in the Affidavit of Defendant Robert Payne, attached to this Motion as Exhibit "A" and incorporated herein for all purposes as if fully set forth at

length, Defendant Payne will testify to facts which will exculpate Defendant Bostic *only* if they are tried separately and after Defendant Payne has received immunity, has already been tried separately, or is no longer a defendant in this case.

4. The substance of such testimony and its exculpatory nature with respect to Defendant Billye E. Bostic is contained in the Affidavit of Defendant Robert Payne attached to this Motion as Exhibit "A" and incorporated herein for all purposes as if fully set forth at length.

5. The willingness of Defendant Robert Payne to provide such testimony at a separate trial, after he has already been tried, has received immunity, or is no longer a defendant in this case is contained in the Affidavit of Defendant Robert Payne attached to this Motion as Exhibit "A" and incorporated herein for all purposes as if fully set forth at length.

6. The substance of the testimony of Defendant Robert Payne set forth in such Affidavit is critical to the Defendant Billye E. Bostic's defense to the indictment. Such evidence cannot be introduced through any other person, and the inability to introduce such testimony through the testimony of Defendant Robert Payne will deprive the Defendant Bostic of effective assistance of counsel.

7. As an additional ground in support of this Motion For Severance, Defendant Billye E. Bostic would respectfully direct the Court's attention to the fact that pursuant to discovery the United States of America, through its Assistant United States Attorney Debra

Kanof, has designated for use at trial the following evidence:

a. A tape recording of a telephone conversation between Defendant Robert Payne and Al Hughes which occurred February 15, 1989;

b. Videotapes and accompanying transcripts of depositions of Defendant Robert Payne conducted on June 29, 1990 and July 13, 1990 from a case styled *Robert Payne v. Al Hughes*, Cause Number 90-5046 in the 346th Judicial District Court of El Paso County, Texas.

The Defendant Billye E. Bostic respectfully requests that the Honorable Court conduct an in camera inspection of such evidence pursuant to Rule 14 of the Federal Rules of Criminal Procedure in order to determine whether such evidence is inculpatory as to Defendant Robert Payne, and to assess whether such evidence will be prejudicial to Defendant Bostic. If such prejudice exists, it cannot be dispelled by cross-examination of Defendant Payne since, as shown in the attached Affidavit, he will not testify at a joint trial.

8. As an additional ground in support of this Motion For Severance, Defendant Billye E. Bostic, would respectfully direct the Court's attention to the fact that although the Government has failed to give written notice of Rule 404(b) evidence as required by the Court's prior Discovery Order, the Government has stated to Robert Payne's attorney its intention to introduce Rule 404(b) evidence concerning Payne's actions in four extraneous transactions not named in the indictment which do not involve Defendant Bostic. No Rule 404(b) evidence

has been designated by the Government for use against Defendant Bostic. The spillover effect of such evidence will prejudice Defendant Bostic's right to a fair trial.

9. As an additional ground in support of this Motion For Severance, Defendant Billye E. Bostic would show the Honorable Court that Defendant Payne is charged in all eight counts of this indictment and Defendant Bostic is charged in only two of the eight counts. The spillover effect of the evidence against Payne will cause the Defendant to suffer prejudice which far outweighs any benefit of judicial economy.

WHEREFORE, PREMISES CONSIDERED, the Defendant Billye E. Bostic respectfully requests that the Honorable Court Order the Government to deliver to the Court the evidence set out in paragraph 7 a) and b) of this Motion for an in camera inspection, that the Honorable Court Order that the Defendant Billye E. Bostic's trial be severed from the trial of Defendant Robert Payne, and further Order that the Defendant Robert Payne be put to trial prior to Defendant Bostic's trial so that the Defendant Bostic can introduce in his defense the exculpatory testimony of Defendant Payne.

Respectfully submitted,

/s/ Robert C. Alden
ROBERT C. ALDEN
McGINNIS, LOCHRIDGE & KILGORE
State Bar No. 00979680
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 495-6071
(512) 495-6093 FAX

Respectfully submitted,

/s/ Stephen B. Edwards
STEPHEN B. EDWARDS

State Bar No. 06461500
1120 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(512) 476-3881
(512) 476-3893 FAX

ATTORNEYS FOR DEFENDANT
BILLYE E. BOSTIC

CERTIFICATE OF SERVICE

I hereby certify that on this the 5th day of March, 1993, a true and correct copy of the foregoing Motion For Severance was hand-delivered to the Office of the United States Attorney, Western District of Texas, El Paso Division, El Paso, Texas, and to all counsel of record.

/s/ Stephen B. Edwards
STEPHEN B. EDWARDS

EXHIBIT "A"

AFFIDAVIT

COUNTY OF EL PASO)
)
STATE OF TEXAS)

Before me the undersigned notary public this day appeared Robert M. Payne, who after being by me duly sworn, upon his oath deposed and stated the following:

"My name is Robert M. Payne, and I am one of the Defendants in Cause No. EP-92-CR-447B, styled *The United States of America v. Robert M. Payne, Billye E. Bostic, and Raymond D. Chavez*, now pending in the United States District Court for the Western District of Texas, El Paso Division. I am over the age of 21 years of age and am giving this statement of my own free will.

"The Government has charged one of my co-defendants, Billye E. Bostic, with conspiring to make, and aiding and abetting the making of false entries and false statements in the books and records of El Paso Federal Savings and Loan. I was president of this institution during the period of time covered in the indictment, and Mr. Bostic was an advisory director of the institution. The criminal acts charged in the indictment all relate to a transaction between El Paso Electric Company and El Paso Federal Savings and Loan. Mr. Bostic was not a party to any communications with any regulators, examiners, auditors, or accountants regarding the transaction. As an advisory director, Mr. Bostic would not have been

aware of or involved in the internal processes of how the bank booked the transactions or filed these documents.

"Further, there was no express or implied agreement between myself, Mr. Bostic or Mr. Chavez to hide the "recourse" nature of the transaction from the regulators, directors, or anyone else. At the time of the closing of the sale of these notes, the terms included a contingent repurchase obligation on the part of El Paso Federal to repurchase certain Notes on or before the end of a year in the event that Sun Country Savings and Loan failed to perform on its commitment to purchase the loans from the El Paso Electric Company. This agreement was not a "secret" agreement and was fully set forth in the documents prepared by the attorneys for both the Electric Company and El Paso Federal.

"I will testify to these facts if Mr. Bostic's trial is separate from mine and I am no longer a defendant. I will exercise my Fifth Amendment right not to testify if we are tried together. I will therefore testify to these facts only if I have received immunity or have already been tried separately. I will not testify at any trial where my own guilt or innocence is to be determined."

"I have discussed this affidavit with my attorney, give it of my own free will, and state that it is not the result of any coercion, threats, or promises from any person.

"Further affiant saith not.

SIGNED: /s/ Robert M. Payne
Robert M. Payne

DATE: _____

SWORN TO AND SUBSCRIBED BEFORE ME by the said Robert M. Payne on this the 5th day of March, 1993, to certify which, witness my hand and seal of office.

/s/ Karen Jenkins Crutchfield
Notary Public,
State of Texas

_____

(Printed or Stamped Name of

My commission expires: _____

KAREN JENKINS CRUTCHFIELD
Notary Public, State of Texas
My Commission Expires 8-28-96

_____

[p. 1-2] (Docket Call.)

(Open Court.)

COURTROOM DEPUTY: EP-92-CR-447, Robert Payne represented by Malcolm McGregor and Tom Stanton, Billye Bostic, represented by Robert Alden, and Raymond D. Chavez, represented by Mike McDonald and Marc Robert.

MS. KANOF: Debra Kanof and David Rosado for the United States. We are ready for trial, Your Honor.

MR. STANTON: Tom Stanton and Malcolm McGregor, Your Honor, for Defendant Robert Payne.

MR. ALDEN: Robert Alden and Steve Edwards for Defendant Bill Bostic. We are ready, subject to some motions.

MR. ROBERT: Marc Robert and Mike McDonald for Raymond Chavez. We are also ready, subject to some motions. Your Honor, one of those motions we would like to have heard in chambers, if possible.

THE COURT: Okay.

MS. KANOF: I also have a motion, Your Honor, that deals with one of the witness' availability and it also needs to be in chambers.

THE COURT: We will take up the star chamber matters at a later time. There has been a motion filed for a bench trial in this case. I won't pass on any of the rest of the motions until I hear them, but I am going [p. 1-3] to deny that one. This will be a jury trial. Immediately after this docket call, while we are waiting for the Jury to come

in, we will. First, assuming whatever I do on those motions, how long is it going to take to try this?

MS. KANOF: Your Honor, the Government's witness list lists 37 witnesses. I only anticipate calling about a little more than half that many. I expect the Government's case should take about two days.

MR. STANTON: Your Honor, respectfully, cross examination of half of those witnesses may extend the Government's case in chief beyond that. I have got about five witnesses for Defendant Payne.

MR. ALDEN: Your Honor, I agree. I don't think we can finish the Government's witnesses in two days. How long our case takes depends on what evidence they put on. I think we can finish it this week, though.

THE COURT: Well, your are right about that, Mr. Alden. I will promise you that it will be finished this week.

MR. ROBERT: Your Honor, we can't estimate the length of our case until the Government's case is concluded, but I concur with Mr. Alden.

THE COURT: Maybe Wednesday. All right. Let's call the rest of them.

(End of docket call for this matter.)

[p. 1-4] (In Chambers.)

THE COURT: All right. You asked to come back here. We have two matters that we need to take up in chambers, and they are?

MR. ROBERT: Your Honor, I filed a motion to dismiss this case on the grounds of prosecutorial misconduct. The allegation is basically last week Ms. Kanof contacted Mr. Stanton, they were trying to work out a plea deal and in the course of that conversation, it is my understanding that they proposed that Mr. Payne might be allowed to plead guilty if he would agree not to testify in a subsequent trial of Mr. Chavez and Mr. Bostic, and that if called on to do so, that he would take the Fifth Amendment. Now, it is my further understanding that Ms. Kanof didn't want to commit this to writing until Mr. Stanton had done some research as to the propriety of the proposal. But it is Defendant Chavez's position that having made the proposal has a serious chilling effect on his right to present defensive testimony. And, in fact, it seems to me it would make it difficult for Mr. Payne to testify in his own defense should he decide to do so, despite the fact of the affidavit that he signed that said that he wouldn't, or in any subsequent trial, because of the indication there would be the potential of a perjury prosecution on down the line. Additionally, Your Honor, [p. 1-5] in addition to the motion to dismiss, I think that what happened last week is fairly *Brightline* grounds for the motion in support of the motion to sever. It indicates that certainly the Government perceives that testimony which we sought to have available to us by virtue of the motion to sever is extremely important, may be the most important piece of evidence in the trial that Mr. Chavez would have. And we would reurge that motion at this time on the basis of what we learned last week.

MS. KANOF: Very, very early in Mr. Stanton's appointment, or, excuse me, hire for counsel for Mr.

Payne, Mr. Stanton came to me and told me that his client would exonerate Mr. Chavez and Mr. Bostic by saying that they didn't agree to do anything. At that time, I told him I thought his client was lying, for several reason [sic]. One of them was because factually, my belief was the exhibits and evidence in this case would support otherwise. And I felt and I told Mr. Stanton that at that time, which was several months ago, that I did not believe his client. In addition to that, I have about five instances where his client has lied and a couple of them under oath in a deposition, and I did not, could not sponsor his client's testimony in that way by agreeing. After that happened, Mr. Stanton gave me a written proffer on another matter, again trying to get his client a plea, [p. 1-6] in that he again said to me that Mr. Bostic's testimony would tend to exculpate the other two.

MR. ALDEN: Mr. Payne's testimony.

MS. KANOF: I'm sorry, Mr. Payne's testimony, would tend to exculpate the other two in that there was no agreement. Again, I told him, and in fact refused to proffer on other matters because I did not believe that to be truthful. Then in the last minute negotiations last week, Mr. Stanton asked for a cornucopia of different proposals for his client, the great job – his client had all kinds of different ideas, he will do this, he will do this, he will do this, and I told him then it would result in my opinion his client testifying falsely. And I said, you know, I have never heard of it and I don't know whether or not it is lawful or you can do it in a plea agreement, but if your client would not testify, in other words, if he would not suborn perjury, then I might consider – I did not say I would – I said I might consider, among other things, not –

of permitting him to plead to a count, but then I didn't know. Mr. Stanton became a little bit angry and said, "I am not going to do your research for you." I said, "Well, Mr. Stanton, you are the one that wants a plea, and any research that needs to be done needs to be done by you," and I said, "I am not even saying it is likely, I am just saying we can talk [p. 1-7] about it, if it is proper," but I did not know whether it was proper at the time. And after that, we did not discuss the issue further.

MR. EDWARDS: Judge Bunton, on behalf of Defendant Bostic, I would like to join in the motion to dismiss and I would like to ask Mr. Stanton to give his version of the events also.

THE COURT: Okay. Mr. Stanton.

MR. STANTON: Your Honor, both Mr. Robert and Mr. Stanton are substantially accurate in reporting what happened. The only thing I would add is that with respect to conversations on Thursday, we had two conversations, Ms. Kanof and I, by telephone, and in addition to the discussion about an acceptable plea agreement for her, she asked me to talk about it with Mr. Payne, to see his view, whether he would, be willing to do that. I did so, and in addition, later that day, the plea negotiations broke down, really at the end of this episode, with her telling me we can go to trial Monday on this. And there has not been any other plea negotiations with the exception of a telephone call made on Friday requesting, again, they permit him to plead to one count of the indictment. What I would take away from it is really just for argument's sake, it is my view that Mr. Payne has not perjured himself, has not lied, and that the evidence, she

is [p. 1-8] entitled to argue evidence on that. My reason for attempting a guilty plea to one of the counts, throughout this, it has been my strong view, given the circumstantial evidence in this case, that Mr. Payne would likely be found guilty on at least that one count, 404(b) material here, that Ms. Kanof has suggested would be there for cross examination. Mr. Payne and I have attempted to limit his exposure to this one count plea. I did talk to Mr. Payne about it and I did tell co-defendants about it through their lawyers, there was discussion. She is right, that in the second conversation, she did ask to research it as to the propriety, whether it was proper or legal, and I declined to do so at that time.

MR. ROBERT: Your Honor, I don't have any reason to think that Mr. Payne's testimony, what he said in the affidavit and what I anticipate will be said on the stand, is perjurious, is a lie. Ms. Kanof obviously is entitled to her opinion, but the only reason I submit the motion is that it seems to me that any time you try to prevent testimony from reaching the Court that that is improper and should be grounds for dismissal.

MR. ALDEN: Your Honor, the only thing I want to add, it is my understanding of the first conversation that Mr. Stanton had with Ms. Kanof, obviously I wasn't a party to it, so they may correct me if I am wrong, but during [p. 1-9] that conversation, there was a proposal put forth by Ms. Kanof that he could enter a plea to one count, and part of the plea agreement would be that he would not testify on behalf of Mr. Bostic or Mr. Chavez at all, and that if he did testify, he would be breaching the plea agreement. It was in the second conversation where the question came up of doing legal research. You know, I

am a novice in criminal stuff, I have to admit, and I haven't been around it very long, but I get the suspicion that if I approached, as a defense lawyer, if I approach a witness and offer him anything of value, whether they accept it or not, whether it is inchoate or a complete offense, that I would find myself under indictment if the U.S. Attorney ever found out about it. I may be naive, but it seems to me that is the type of tampering with witnesses that is forbidden by the code of professional responsibility and borders on a violation of the Obstruction of Justice statute. Maybe I am too zealous to know and naive, but that is my opinion. But it is clear from the beginning Ms. Kanof has not believed Mr. Stanton, Mr. Payne's testimony, and has indicated that she thinks it would be perjury. And there is no way, now, that Mr. Payne can take that stand. That attitude of hers has had a definite chilling effect on Mr. Payne, he cannot take that stand, with the fear that he is going to be indicted for perjury, [p. 1-10] whether it is in his own defense or testify on behalf of our clients. And from the beginning, there has been a concerted effort by her to do everything she can to prevent us, as defendants, from having access to that testimony.

MR. EDWARDS: Let me point out one other thing, too. I think one of the crucial issues that the Court needs to focus on is the determination of whether somebody is lying or not is up to the jury. One of the things that the jury and the Court's are supposed to determine is credibility. Ms. Kanof takes it on herself on the day of trial and says, "I don't believe this person, therefore, this person is lying." Therefore, if they testify they are suborning perjury. And that seeks to limit our access to

exculpatory evidence on those grounds. She knew from when I filed on March the 5th our motion for severance with the affidavit of Mr. Payne in it, which was clearly exculpatory, she knew the contents of what he would say on the witness stand. So this is something that occurred knowingly, after knowing what he is going to do if he takes the witness stand, and to make part of a proposed plea agreement that he not testify at all is a clear due process violation. The fact that it did not yet occur makes it no less onerous, because it very well could have occurred. All Mr. Stanton would have had to say is, [p. 1-11] "Let's do it."

MS. KANOF: May I respond?

THE COURT: Yes.

MS. KANOF: Your Honor, you had better believe that if I put a witness on the stand that I did not believe was telling the truth that I would not only be before this Court, but I would be before the Ethics Committee of the Department of Justice. And what the defense is saying, I have a duty not to -- to keep my mouth shut as to my opinion about whether or not somebody is going to tell the truth. It wasn't the proffer or the affidavit that they filed that alerted me to what Mr. Payne wanted to say. Mr. Stanton told it to me months ago from the very beginning. We discussed it over and over again. In fact, he compared what he believed to be the truthfulness of some of my witnesses to what I believed to be the truthfulness of his witnesses. And it would surely have a chilling effect on negotiations if we were not allowed to openly discuss our belief of whether or not the testimony was truthful or accurate or its end result. Then I wouldn't

be able to enter into plea agreements at all because it is necessary to discuss those kind of issues. In addition to that, it is the Government's duty to seek justice, and while I did not have the intent to chill anything, what the defense is saying is, "Don't ever [p. 1-12] say you don't believe one of our witnesses because then we are going to go tell them and then you have chilled our right to present a witness by threatening perjury." Well, the threat of perjury always hangs over a witness' head, and the duty to tell the truth is always present in the Courtroom. And the fact that I said it out loud doesn't make it any different. The first conversation that I had with Mr. Stanton, while we did not have a challenge to go research, I also said to Mr. Stanton in that first conversation, "I don't know whether or not this is proper, but I have a concern about your client testifying untruthfully."

MR. McDONALD: Your Honor, the problem, as I see it from my client, is not the perjury side of this so much as the U.S. Attorney telling a defense counsel, Mr. Stanton, that if your client will not testify, then we will give you the benefit of a plea agreement. That is a most valuable thing for a person to limit exposure, that is much more valuable than money to most people in the world, is their freedom. And we are not talking about a total freedom, we are talking about limiting exposure of punishment. And that is the real key, the cornerstone of this motion that has been filed by Mr. Chavez.

MS. KANOF: Except that is not what I did. I said I didn't know whether or not that was proper and I didn't [p. 1-13] know whether or not we could agree to that.

MR. McDONALD: I think we – if we could, Your Honor, I would like to swear Mr. Stanton and get sworn testimony for the record so we can find out at least clearly under sworn testimony what occurred at the meeting. It won't take but a minute or two, I only have about four or five questions.

THE COURT: I will swear Mr. Stanton, and you have two minutes.

MR. McDONALD: All right.

(Witness sworn.)

THOMAS E. STANTON, WITNESS, sworn

EXAMINATION

BY MR. McDONALD:

Q. State your name.

A. Tom Stanton.

Q. Mr. Stanton, you represent who in this case?

A. Robert Payne.

Q. And have you negotiated with the Government, specifically last week, for a plea bargain agreement for Mr. Payne?

A. I entered into discussions attempting to obtain a plea agreement.

Q. I believe we were talking, was it last Thursday, that you had a couple of calls, phone calls, with the [p. 1-14] prosecutor?

A. Yes.

Q. Could you tell us in your own words the first conversation?

A. The first conversation occurred after 9:00 on Thursday morning, that was the date that – that was the time and date that an offer of a plea for all three expired. And I called Ms. Kanof and asked her whether she had a backup plan as to Mr. Payne for the reason I understood the co-defendants would not plead guilty. In the course of the conversation, she suggested that it would be acceptable to her if a plea, in exchange for a plea Mr. Payne agreed not to testify in the case for Bostic and Chavez, and that if he did testify, she would deem it breaking the plea agreement. And she did say that she did not know whether they could do it, but knew that it had been done before, thought it had been done previously. I concluded the conversation and related it, Mr. Payne was in my office, but did not hear the conversation, and I went to him and talked to him about the conversation. Okay. If it is okay for me to continue with the narrative, I will do so.

THE COURT: It is on his time.

BY MR. McDONALD:

Q. I have already got what I want, but go ahead and [p. 1-15] explain the full conversation. I have for the record what I need, but go ahead.

A. In the second conversation, Ms. Kanof did decline to commit it to writing, but did indicate that she did not know whether it was proper and again suggested that I research it and in the event that I researched it and told her that it could be entered into, then she would recommend it to Mr. Ederer. My recollection is that part

of the conversation didn't occur in the first conversation. By then, I had discussed it with Mr. Payne as to why he would do in the presence of –

Q. Talking about two separate conversations?

A. That's right. It was in the second conversation that this last occurred, and I declined to do the legal research to tell her whether it was proper or not. And we concluded the conversation with the negotiations breaking down, and I would be going to trial Monday.

MR. McDONALD: That is all I need.

THE COURT: Okay. The motions to dismiss are denied. The motion, I have already told you the motion to try it before the Court is denied. I am looking forward to seeing Mr. Alden and Mr. Edwards get a little higher profile. I tried a case with them one time and the case was over before they ever identified themselves, you know, and it is good to have you.

* * *

[p. 1-21] MR. McDONALD: We would like to adopt all of their motions.

MR. EDWARDS: We will adopt all of their motions.

THE COURT: Off the record.

(Off the record.)

MR. STANTON: Your Honor, I need to make a motion on behalf of Defendant Bob Payne. The motions heard [p. 1-22] today, I just need to join in those. I haven't make [sic] a record on that.

THE COURT: All defendants have all motions, they are all adopted and all denied, except the one for the bench trial. That one is denied.

(End of in chambers hearing.)

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[p. 3-75] MR. ALDEN: I am not going to argue with you on that, Judge. I think the Fifth Circuit requires me to reurge the motion for severance prior to trial on the issue of not being allowed to have exculpatory evidence on that ground.

THE COURT: That is denied. And yours is denied likewise. I am not going to sever this case at this time.

Now –

MS. KANOF: In that case, Your Honor, then if you would like to bring the Jury in, the Government is going to rest.

[p. 3-86] (Jury excused from the Courtroom.)

THE COURT: Mr. Brigman will give you a preliminary draft of the Charge. For the record, let the record reflect that after everybody closed, that each of the counsel for the defendants, Mr. McDonald and Mr. Edwards and Mrs. Stanton, reurged their motions in full, in toto, to the Court, and the Court, after due deliberation and consideration, denied the motions. For purposes of the records, that has been made after the Government has closed.

MR. ROBERT: Your Honor, that is as to Rule 29 and the severance.

THE COURT: Yes. The severance and the 29. I think the severance comes first, but then we will go ahead. All right. And the severance as to Mr. Bostic.

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STATEMENTS BY THE COURT

* * *

[p. 3-262] Now, insofar as the restitution is concerned, I will not order any restitution. I know the Government's position is that you owe 576,000 plus dollars. I got a memorandum from Mr. McGregor, it was adopted by the others, that the loans that were involved in the transfer of the assignments between the savings and loan and the El Paso were good loans and had been paid. I didn't, I heard all the testimony, I didn't find that there was any loss because of this to El Paso Savings and Loan, and I so find that there was no loss. As a consequence, no restitution will be ordered. Also, after I received the memorandum from Mr. McGregor, I sent that memorandum to Ms. Kanof and asked for the Government's response. My response was a two-page letter of gobbledy-gook about the regulators not being able to oversee these loans. Not one bit of that response had to do with one single, solitary loan that Mr. [p. 3-263] McGregor had pointed out. If the Government wants to collect for the savings and loan fiascos, and they were fiascos – whether this one was or not, I don't know – the RTC, who has hundreds of employees, they have multi-computers, all they have to do to get me to order restitution is to say, "Judge, here are these loans, these weren't paid because these folks didn't dot the I, cross the T, violated this, here is what they owe. Don't tell me that we don't have access to their books. This occurred some years after this offense had occurred where they were not allowed to go in, and I find that the savings and loan was a viable one until Mr.

Hughes and then the RTC took it over. As a consequence, I will not order any restitution.

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